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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-925

PHILIP JOSEPH MAITA,

Petitioner,

vs.

EARL WHITMORE, SHERIFF,

Respondent.

Opposition of Respondent to Petition for Writ of Certiorari

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (*Maita v. Whitmore,* No. 74-1498) has not yet been published. A copy of the court's opinion is appended to the petition for a writ of certiorari (Appendix A to Petition).

The Memorandum and Order of the United States District Court for the Northern District of California is reported at 365 F.Supp. 1331 (1973). A copy of that court's opinion is also appended to the petition for a writ of certiorari (Appendix B to Petition).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3).

QUESTION PRESENTED

Petitioner was not entitled to trial by jury as the offense charged was a petty offense.

STATUTES INVOLVED

California Penal Code section 11225, which provides:

> "Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation or prostitution, are held or occur, is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance."

California Penal Code section 11226, which provides:

> "Whenever there is reason to believe that a nuisance as defined in this article is kept, maintained or is in existence in any county, the district attorney, in the name of the people of the State of California, must, or any citizen of the State resident within said county, in his own name may, maintain an action in equity to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee or agent of the building, or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting it."

California Penal Code section 11227, which provides:

> "Whenever the existence of a nuisance is shown in an action brought under this article to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance."

California Penal Code section 11229, which provides:

> "Any violation or disobedience of an injunction or order expressly provided for by this article is punishable as a contempt of court by a fine of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000) by imprisonment in the county jail for not less than one nor more than six months, or by both."

California Penal Code section 669, which provides in pertinent part:

> "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently, or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be. . . ."

STATEMENT OF THE CASE

On December 11, 1969, the District Attorney of San Mateo County filed a civil complaint in the California Superior Court in and for the County of San Mateo against petitioner and the owner of the building in which petitioner's bar business was located.[1] The complaint alleged, pursuant to the provisions of California Penal Code section 11225, that entertainment presented in petitioner's bar constituted a

1. Petitioner's bar, the "Easy Street", offered entertainment to its patrons as well as alcoholic beverages.

public nuisance, and sought injunctive relief to abate the nuisance.

On January 27, 1970, the Superior Court issued a temporary injunction by which petitioner was enjoined from presenting certain types of films and other entertainment to patrons on his premises. This injunction was issued pursuant to the provisions of California Penal Code section 11227.

On September 14, 1971, the temporary injunction was modified pursuant to stipulation between petitioner and the San Mateo County District Attorney. Even as modified, however, the injunction continued to enjoin the exhibition of certain types of films and other entertainment.

On February 2, 1972, petitioner was served with an order to show cause by which he was charged with four counts of contempt of court for violation of the preliminary injunction of January 27, 1970, as modified September 14, 1971. The order to show cause charged that on each of four dates in January, 1972, petitioner exhibited sexually explicit films and permitted nude cocktail waitresses on his premises in violation of the injunction.

On February 17, 1972, petitioner appeared in the Superior Court in response to the order to show cause. Following a denial of petitioner's request for a jury trial, a hearing was conducted during which evidence was presented by both sides.

On March 3, 1972, the Superior Court found petitioner in contempt of court on each of the four counts alleged. Petitioner was sentenced to six months in the county jail on the first count, with four of the six months suspended. He was sentenced to sixty days in the county jail on each of the other three counts, these sentences to be served concurrently with the sentence imposed on the first count.

Petitioner was also ordered to pay a fine of $1,000.00 on Count One, and $500.00 on each of Counts Two, Three and Four, for a total of $2,500.00.

Petitioner sought relief on habeas corpus and certiorari from the California Court of Appeal, First Appellate District. His petitions were denied on May 19, 1972. The California Supreme Court denied a hearing on June 15, 1972.

On June 6, 1972, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California. At substantially the same time, the Honorable William O. Douglas, Associate Justice of the United States Supreme Court, issued an order staying the judgment of the California Superior Court pending the filing and adjudication of a petition for writ of certiorari in the United States Supreme Court. Petitioner filed a petition for writ of certiorari to the United States Supreme Court on September 1, 1972. The petition was denied on February 20, 1973 (Mr. Justice Douglas would have granted certiorari) (No. 72-407).

The habeas corpus petition was then resubmitted to the District Court. On November 12, 1973, following a hearing, the District Court issued a memorandum and order by which it concluded, *inter alia,* that petitioner had been deprived of his Sixth Amendment right to trial by jury in the state court. The District Court therefore vacated the judgment and sentence of the California Superior Court. Notice of appeal from this order was filed in timely fashion, and the District Court stayed imposition of its order pending determination of the appeal.

On December 9, 1974, the Court of Appeals for the Ninth Circuit reversed the order of the District Court, holding that petitioner's right to a jury trial had not been abridged. The Court of Appeals stayed the issuance of its mandate

pending the filing of a petition for writ of certiorari in the United States Supreme Court.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The offense with which petitioner was charged herein was a petty offense not requiring trial by jury, as the California Legislature has determined by virtue of California Penal Code section 11229 that such violations are punishable by no more than six months imprisonment. Moreover, while petitioner was charged with four separate violations of that statute, the total sentence imposed for all of the violations was less than six months, and, therefore, this case is squarely governed by the holding of this Court in *Taylor v. Hayes,* 418 U.S. 488 (1974).

ARGUMENT

I. Petitioner Was Not Entitled to Trial by Jury, as the Offense Charged Was a Petty Offense.

Petitioner contends that the decision of the Court of Appeals conflicts with the decisions of this Court, and that denial of jury trial constituted a violation of rights guaranteed him by the Sixth Amendment to the United States Constitution. In support of this contention, petitioner urges that, as he was charged with four counts of contempt, he faced a total possible sentence of two years in jail. Accordingly, placing principal reliance on the holding of this Court in *Baldwin v. New York,* 399 U.S. 66, 69 (1970), petitioner urges that it should be the maximum sentence *possible* under all counts combined which dictates whether jury trial is available, rather than the sentence actually imposed.

At the outset, we submit that petitioner's argument was specifically rejected by this Court in *Taylor v. Hayes,* 418 U.S. 488 (1974). In that case this Court stated:

> "Petitioner contends that any charge of contempt of court, without exception, must be tried to a jury. Quite to the contrary, however, our cases hold that petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute. *Cheff v. Schnackenberg,* 384 U.S. 373 (1966); *Bloom v. Illinois,* 391 U.S. 194 (1968); *Dyke v. Taylor Implement Mfg. Co., Inc.,* 391 U.S. 216 (1968); *Frank v. United States,* 395 U.S. 147 (1969); *Baldwin v. New York,* 399 U.S. 66 (1970). Hence, although petitioner was ultimately found guilty and sentenced separately on eight counts of contempt, the sentences were to run concurrently and were, as the Kentucky Court of Appeals held, equivalent to a single sentence of six months. Cf. *Codispoti v. Pennsylvania, post,* p. 506. The original sentences imposed on the separate counts were to run consecutively and totaled almost four and one-half years, with two individual counts each carrying a year's sentence. But the trial court itself entered an amended judgment which was understood by the Kentucky Court of Appeals to impose no more than a six-month sentence. The eight contempts, whether considered singly or collectively, thus constituted petty offenses, and trial by jury was not required." *Id.* at pp. 495-496.

In the case at bar petitioner was cited for four independent counts of contempt, each pursuant to the provisions of California Penal Code section 11229. By the terms of that statute, violation of the injunction herein was punishable "by imprisonment in the county jail for not less than one nor more than six months . . ." Thus, petitioner's reliance on *Baldwin v. New York, supra,* is misplaced, as that case is readily distinguishable. The New York statute under

which the defendant was tried in that case provided for a possible one-year sentence for each violation. 399 U.S., at pp. 69-70. This Court held that jury trial was required due to the *possibility* of a one-year sentence, adhering to the rule of *Duncan v. Louisiana,* 391 U.S. 145 (1968), that the Sixth Amendment requires that defendants be afforded the right to trial by jury when they stand accused of *serious* crimes. This Court has consistently held, however, that a "petty" offense for which jury trial is not required is one in which no more than six months imprisonment is authorized. *Codispoti v. Pennsylvania,* 418 U.S. 506, 512 (1974). Significantly, petitioner could not have been punished by imprisonment for more than six months for each violation of California Penal Code section 11229. Thus, the California Legislature has not determined that such violations constitute serious crimes for which jury trial is required.

Further, as in *Taylor v. Hayes, supra,* the terms of imprisonment to which petitioner was actually sentenced for *all* of the violations did not constitute a period of more than six months. Indeed, petitioner herein was sentenced to six months imprisonment on the first violation, *four months of which was suspended.* On each of the other three violations he was sentenced to a term of sixty days imprisonment, but those terms were ordered to run *concurrently* with the terms of imprisonment imposed for the first violation. Thus, petitioner was actually sentenced to a period of sixty days imprisonment for all of the violations. Respondent therefore submits that this case is squarely governed by *Taylor v. Hayes, supra,* and that accordingly, petitioner's argument must be rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated: April 4, 1975

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